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FISH & RICHARDSON P.C. (BO)
P.O. BOX 1022
MINNEAPOLIS, MN 55440-1022

EXAMINER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte NANCY J. TOLAN, MARK A. CLARNER, WILLIAM B. S.
MC DOUGALL, NORMAND A. COTE, HOWARD A. KINGSFORD,
PAUL R. ERICKSON and CLINTON DOWD

Appeal 2009-012137
Application 10/688,032
Technology Center 3600

Before JOHN C. KERINS, KEN B. BARRETT and
MICHAEL C. ASTORINO, *Administrative Patent Judges*.

ASTORINO, *Administrative Patent Judge*.

DECISION ON APPEAL

1 The Appellants appeal under 35 U.S.C. § 134 from the Examiner's
2 decision finally rejecting claims 1-3, 5-20, 22-37, 39-53 and 55-57.¹ More
3 specifically the Examiner rejects:

4 claims 1-3, 7-20, 24-37 and 39-53 under 35 U.S.C. § 103(a) as
5 unpatentable over Kingsford (US 6,851,161 B2, issued Feb. 8, 2005),
6 Provost (US 4,984,339, issued Jan. 15, 1991) and Kennedy (US
7 6,248,419 B1, issued Jun. 19, 2001)²; and

8 claims 5, 6, 22, 23, 39, 40 and 55-57 under § 103(a) as
9 unpatentable over Kingsford, Provost and Kennedy.

10 Claims 4, 21, 38 and 54 have been cancelled. Claims 1, 19 and 37 are
11 independent claims. We have jurisdiction over the appeal under 35 U.S.C.

¹ In the Reply Brief at page 2 the Status of the Claims section identifies claim 54 as both a pending and a cancelled claim. Since claim 54 is not identified in the Claims Appendix and was cancelled in the Appellants' Amendment in Reply to Office Action of January 10, 2006, filed May 15, 2006, we treat claim 54 as a cancelled claim.

² The Examiner's Answer at page 3 includes Kennedy in the preamble of the rejection of claims 1-3, 7-20, 24-37 and 39-53. This is a typographical error. The body of the rejection of claims 1-3, 7-20, 24-37 and 39-53 lacks a reference to Kennedy as evidence. Ans. 3-6. The Examiner clearly notes that claims 1-3, 7-20, 24-37 and 39-53 are rejected under § 103(a) as being unpatentable over Kingsford and Provost, not Kennedy. Ans. 8. Additionally, the preamble of the subsequent rejection states that dependent "[c]laims 5, 6, 22, 23, 39, 40 and 55-57 are rejected under § 103(a) as being unpatentable over Kingsford et al. in view of Provost et al. as applied to claim 1, 19 and 37 above, and further in view of Kennedy et al." Ans. 7. The phrase "further in view of Kennedy" suggests that Kennedy was not used as evidence in the former rejection. The Examiner's Answer at page 10 also notes that Kennedy is used to reject claims 5, 6, 22, 23, 39, 40 and 55-57 but not the former set of claims. We treat the reference to Kennedy regarding the rejection of claims 1-3, 7-20, 24-37 and 39-53 as a typographical error and as such we exclude Kennedy as evidence for those claims.

1 § 6(b). The Appellants' representative presented oral argument, via
2 videoconference, in this appeal on July 13, 2011.³

3 We REVERSE.

4 Claim 1 is illustrative of the claims on appeal:

- 5 1. A releasable touch fastener comprising
6 a loop component having a sheet-form loop
7 base and an array of female fastener elements
8 extending from the loop base; and
9 a hook component having a sheet-form hook
10 base and an array of male fastener elements
11 extending from the base and configured to
12 releasably engage the female fastener elements of
13 the loop component;
14 wherein the touch fastener has an Engaged
15 Thickness of less than about 0.11 inch, and
16 wherein the hook and loop components are
17 so configured to provide a Final Peel Resistance of
18 at least 0.3 pound per inch of closure width.⁴

19 Claim 19 recites a releasable touch fastener including "wherein the
20 touch fastener has an Engaged Thickness of less than about 0.11 inch, and

³ We note that the transcript of the oral argument is incomplete. The untranscribed material does not affect the outcome of this decision.

⁴ The Specification at page 23 provides that "'Engaged Thickness' is a measurement of the overall thickness of the engaged closure, prepared according to paragraphs 6.1 through 8.23 of ASTM D5170-98, and then engaged according to paragraph 8.24 of ASTM D5170-98, except that the roller is pushed across the closure in only one direction, for one pass, constituting one-half of a cycle. Engaged Thickness is then measured with the closure in an unloaded state, such as by optical measurement viewing the closure from its longer edge. Thus, the thickness measurement is made following initial engagement under static load of one-half pound per square inch for two seconds and one rolling load of 11 pounds per inch of closure width."

1 wherein the male and female fastener elements are so configured to provide
2 an Initial Peel Resistance of at least 0.5 pounds per inch of closure width.”

3 Claim 37 recites a releasable touch fastener including “wherein the
4 touch fastener has an Engaged Thickness of less than about 0.11 inch, and
5 wherein the male and female fastener elements are so configured to provide
6 an Initial Shear Resistance of at least 10 pounds per square inch.”

7 Kingsford describes “reclosable closure 10 consists of two
8 longitudinally continuous strips 12 and 14 which, when facially engaged, are
9 held together by hook and loop fastening principles. The inner side of strip
10 12 has two fields of hook-engageable loops 16, separated by a female seal
11 profile portion 20.” Kingsford, col. 3, ll. 41-47. Kingsford also describes,
12 “[t]he width of the closure strips in many applications is 0.5 inch or more,
13 with an overall *engaged thickness* of less than about 0.04 inch.” Kingsford,
14 col. 3, ll. 63-65 (italics added). Kingsford is silent concerning the fastening
15 strength specific to Final Peel Resistance, an Initial Peel Resistance or Initial
16 Shear Resistance of the reclosable closure 10.

17 Provost discloses a hook and loop fastener where the hook height is
18 0.050 inches \pm 0.002 inches. Provost, Abstract and col. 5, l. 8. Provost also
19 discloses fastening strength properties of the hook portion in Table III,
20 which includes peel and shear resistance. Provost, col. 8, ll. 5-28. However
21 Table III does not specify whether the peel resistance refers to initial or final
22 peel resistance or whether the shear resistance refers to initial or final shear
23 resistance.

24 The Appellants admit all of the recited claimed elements were
25 individually known in the art however Appellants argue that the combination
26 of elements was not obvious. Reply Br. 3. The Appellants contend the

1 combined teachings of Kingsford and Provost do not result in the claimed
2 fastening strength, which includes both the claimed engaged thickness and
3 one of the claimed Final Peel Resistance, Initial Peel Resistance or Initial
4 Shear Resistance as recited in claims 1, 19 and 37 respectively. *See App.*
5 *Br. 5.* In other words, the fastening strength of the engagement of specific
6 hooks to specific loops is largely dependent on the structural features of the
7 specific hooks and specific loops.

8 Regarding claim 1, the Examiner finds Provost teaches a Final Peel
9 Resistance of at least 0.3 pounds per inch of closure width. *Ans. 4.* The
10 Examiner then concludes it would have been obvious to have a releasable
11 touch fastener providing a final peel resistance at least 0.3 pounds per inch
12 of closure width as taught by Provost in the fastener disclosed by Kingsford,
13 since it is well known in the art and helps retain tension necessary to create a
14 better seal for closure. *Id.* The Examiner supports this conclusion with a
15 finding that Provost discloses the required engaged thickness of less than
16 about 0.11 inches because “there is 0.060 inches left to meet this limitation
17 and Figure 24, although not to scale, illustrates that the height of the loop
18 fastener is meant to be smaller than the height of the hook fastener and
19 therefore the limitation can be met.” *Ans. 9.*

20 The Appellants point out that Provost’s drawings, specifically Figure
21 24, are not scaled. *Reply Br. 4.* As such, the Appellants correctly contend
22 that the Examiner is relying on improper findings to determine the thickness
23 of Provost’s loops; since the thickness of Provost’s loops cannot be
24 determined, Provost’s teachings specific to peel resistance and shear
25 resistance cannot be relied upon for the purposes of combining fastening
26 properties of Provost with those of Kingsford. *See Reply Br. 3-4.*

1 For the reasons provided above we do not sustain the rejection of
2 independent claims 1-3, 7-20, 24-37 and 39-53 under 35 U.S.C. § 103(a) as
3 unpatentable over Kingsford and Provost.

4 Turning to the rejection of claims 5, 6, 22, 23, 39, 40 and 55-57 under
5 § 103(a), the Examiner finds that Kennedy discloses a fabric backing 25 at
6 the side of the hook base for adding strength to the base and providing a
7 substantial modification of the base of the hook component. Ans 7;
8 Kennedy, col. 6, ll. 3-8. The Examiner does not point out how the teachings
9 of Kennedy might remedy the deficiency of the combined teachings of
10 Kingsford and Provost as pointed out in connection with the rejections of
11 independent claims 1, 19 and 37. Since the Examiner's conclusion of
12 obviousness lacks rational underpinning, we do not sustain the Examiner's
13 final decision rejecting claims 5, 6, 22, 23, 39, 40 and 55-57 under § 103(a)
14 as being unpatentable over Kingsford, Provost and Kennedy.

15
16 **DECISION**

17 We REVERSE the Examiner's decision rejecting claims 1-3, 5-20,
18 22-37, 39-53 and 55-57.

19
20 **REVERSED**

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22 Klh